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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

REPUBLICAN NATIONAL
COMMITTEE; REPUBLICAN PARTY
OF ARIZONA, LLC, and YAVAPAI
COUNTY REPUBLICAN PARTY,

Plaintiffs,

v.

ADRIAN FONTES, in his official capacity
as Arizona Secretary of State,

Defendant.

No.

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

1 Plaintiffs respectfully move under A.R.S. § 12-1801 and Arizona Rule of Civil
2 Procedure 65, for entry of a preliminary injunction prohibiting the implementation or
3 enforcement of the 2023 Elections Procedures Manual (2023 EPM) based on the Secretary
4 of State’s failure to substantially comply with the Arizona Administrative Procedure Act
5 (APA), A.R.S. §§ 41-1001 to -1092.12 in its promulgation.

6 In the alternative, Plaintiffs respectfully move under A.R.S. § 12-1801 and Arizona
7 Rule of Civil Procedure 65, for entry of a preliminary injunction prohibiting the
8 implementation or enforcement of the 2023 EPM to the extent it:

- 9 1. Eliminates the obligation of county recorders to cancel the registration of voters
10 who self-report their status as noncitizens on a juror questionnaire and, after follow
11 up by the recorder, do not provide proof of citizenship;
- 12 2. Allows “federal-only” voters who have not provided proof of citizenship to vote
13 in Arizona’s presidential primary, the Presidential Preference Election (PPE);
- 14 3. Prohibits the public from accessing all instances of a voter’s signature, which may
15 be used to verify petition signatures, candidate filing materials, and for other election
16 purposes including ballot verification;
- 17 4. Permits mailing Active Early Voting List (AEVL) ballots outside of Arizona to
18 non-UOCAVA (Uniformed and Overseas Citizens Absentee Voting Act) voters;
- 19 5. Forecloses timely challenges to early ballots received before the ballot is placed
20 into a ballot box; and
- 21 6. Requires that ballots cast outside a voter’s precinct be counted.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **INTRODUCTION**

24 In Arizona, the power to make laws is lodged with the legislative branch. This power
25 is subject only to the people’s reservation of the right to make law directly through the
26 initiative process, or to disapprove of laws adopted by the legislature by referendum. ARIZ.
27 CONST. art. IV; *Wallace v. Smith ex rel. Cnty. of Maricopa*, 255 Ariz. 377, ¶ 9 (2023).
28 Executive agencies that issue rules of general application purporting to administer laws
adopted by the legislature must (1) follow the APA in issuing those rules, and (2) issue only

1 rules consistent with the authority delegated by the legislature. Rules issued in violation of
2 either obligation are “invalid.” A.R.S. § 41-1030(A); *Arizona State Univ. ex rel. Arizona*
3 *Bd. of Regents v. Arizona State Ret. Sys.*, 237 Ariz. 246, 250, ¶ 32 (Ct. App. 2015)
4 (invalidating rule adopted without compliance with APA); *Leach v. Hobbs*, 250 Ariz. 572,
5 576 ¶ 21 (2021) (invalidating EPM regulation that exceeded the scope of statutory
6 authorization); *McKenna v. Soto*, 250 Ariz. 469, 473 ¶ 20 (2021) (invalidating EPM
7 provisions that went “outside the mandates” specifically prescribed by statute).

8 Every other year, the chief election officer for the State of Arizona, the Secretary of
9 State, is tasked with the statutory responsibility of “prescrib[ing] rules” consistent with
10 statutory law for administering federal and state elections in the state in the Elections
11 Procedures Manual (EPM). Considering the import of this document, one would expect
12 maximum notice and public participation in its drafting and adoption, and for the Secretary
13 to hew closely to the authority the legislature delegated to his office. He did neither,
14 however, in finalizing the 2023 version of the EPM. (*See generally* 2023 Arizona Elections
15 Procedures Manual (Dec. 30, 2023) (2023 EPM), **Exhibit 1 to Verified Complaint**.)
16 Secretary Fontes ignored the process required under Arizona’s APA for promulgating the
17 EPM’s rules, which carry the force of law. Indeed, critical portions of the 2023 EPM were
18 not disclosed to the voting public until the final version was released on December 30, 2023.
19 Hence, implementation of the EPM would exceed the Secretary’s authority, defy the
20 legislature’s limitation on rulemaking authority, impose an irreparable injury on Plaintiffs,
21 and erode the constitutional separation of powers.

22 Even if the Secretary’s clear disregard of the APA could be overcome—and it
23 cannot—individual provisions of the 2023 EPM are invalid because they exceed, and in
24 some cases directly contradict, statutory law. This Court should enter an expedited
25 declaratory judgement stating that the 2023 EPM in its entirety is unlawful and a
26 preliminary injunction preventing its implementation. In the alternative, this court should
27 enter an expedited declaratory judgment of invalidity with respect to six specific provisions
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1 of the 2023 EPM outlined below and enter a preliminary injunction preventing these
2 specific provisions' implementation.

3 **LEGAL STANDARD**

4 In considering a motion for preliminary injunction, the Court evaluates “(1) a strong
5 likelihood of success on the merits, (2) the possibility of irreparable harm if the relief is not
6 granted, (3) the balance of hardships favors the party seeking injunctive relief, and (4)
7 public policy favors granting the injunctive relief.” *Fann v. State*, 251 Ariz. 425, 432, ¶ 16
8 (2021); *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). A movant is entitled to injunctive
9 relief if it “establish[es] *either* 1) probable success on the merits and the possibility of
10 irreparable injury; or 2) the presence of serious questions and [that] the balance of hardships
11 tip[s] sharply in favor of the moving party.” *Id.* (emphasis and first alternation added). “This
12 is a sliding scale”—“[t]he greater and less reparable the harm, the less the showing of a
13 strong likelihood of success on the merits need be. Conversely, if the likelihood of success
14 on the merits is weak, the showing of irreparable harm must be stronger.” *Id.* (quoting *See*
15 *Smith v. Ariz. Citizens Clean Elections Comm’n*, 212 Ariz. 407, 410–411, ¶ 10 (2006)).

16 But when, as here, a government official “has acted unlawfully and exceeded his
17 constitutional and statutory authority, [plaintiffs] need not satisfy the standard for injunctive
18 relief.” *Ariz. Pub. Integrity All (“AZPIA”) v. Fontes*, 250 Ariz. 58, 64, ¶ 26 (2020).

19 No matter, all four considerations weigh decidedly in Plaintiffs’ favor.

20 **ARGUMENT**

21 **I. Plaintiffs Are Likely to Establish the Secretary Violated Arizona’s** 22 **Administrative Procedure Act and, Alternatively, That Each of the** 23 **Challenged Provisions in the 2023 EPM Is Contrary to Statute.**

24 **A. (Count I) Plaintiffs Are Likely to Succeed in Establishing the 2023 EPM** 25 **Is Invalid Because the Secretary Prescribed Rules Without Complying** 26 **with the APA’s Rulemaking Procedures.**

27 Ahead of the 2024 election season, the Secretary, through the 2023 EPM, recently
28 “prescribe[d]” 268 pages of “rules” guiding how county, city, and town election officials
run elections in the State of Arizona. (*See generally* **Verified Complaint Exhibit 1**) The

1 breadth of the 2023 EPM is telling—both in terms of its import to a critical function of our
2 democracy and the sheer volume of legal substance it contains. To be sure, the EPM is
3 statutorily mandated. Subsection 16-452(A) of A.R.S. states,

4 [T]he secretary of state *shall prescribe rules* to achieve and maintain the
5 maximum degree of correctness, impartiality, uniformity and efficiency on
6 the procedures for early voting and voting, and of producing, distributing,
7 collecting, counting, tabulating and storing ballots. The secretary of state
8 *shall also adopt rules* regarding fax transmittal of unvoted ballots, ballot
9 requests, voted ballots and other election materials to and from absent
10 uniformed and overseas citizens and shall adopt rules regarding internet
11 receipt of requests for federal postcard applications prescribed by § 16-543.

12 (Emphasis added.) The statute continues by directing the Secretary to “prescribe[]” the
13 “*rules*” “in an official instructions and procedures manual” to be “approved by the governor
14 and attorney general” no later than “December 31 of each odd-numbered year immediately
15 preceding the general election.” § 16-452(B) (emphasis added).

16 The EPM is subject to Arizona’s APA, which has existed in some form since 1952.
17 *See* Ariz. Sess. Laws 1952, ch. 97. The APA applies “to all agencies and all proceedings
18 not expressly exempted” by statute. A.R.S. § 41-1002(A). The APA broadly defines
19 “agency” as “any board, commission, *department*, officer or other administrative unit of
20 this state, *including the agency head* ... whether created under the Constitution of Arizona
21 or by enactment of the legislature.” A.R.S. § 41-1001(1) (emphasis added). The Department
22 of the Secretary of State and the Secretary fall within the APA’s definition of “agency.”

23 As an agency, the Department and the Secretary are required to comply with the
24 APA’s procedures for “rulemaking.” The APA defines “rulemaking” as “the process to
25 make a new *rule* or amend, repeal[,] or renumber a rule.” § 41-1001(22) (emphasis added).
26 And a “rule” is defined as “an agency statement of general applicability that implements,
27 interprets or *prescribes law or policy*, or describes the procedure or practice requirements
28 of an agency.” § 41-1001(21) (emphasis added).

There can be no doubt that the 2023 EPM is a rule under the APA. “[A]n agency
statement is a rule, subject to the APA’s rulemaking procedure, if it, first, is generally
applicable, and, second, implements, interprets or prescribes law or policy, or describes the

1 procedure or practice requirements of an agency.” *Arizona State Univ. ex rel. Arizona Bd.*
2 *of Regents v. Arizona State Ret. Sys.*, 237 Ariz. 246, 250, ¶ 16 (Ct. App. 2015). The
3 Secretary cannot dispute that the 2023 EPM is generally applicable—it applies to every
4 county, city, and town election official administering elections in the state and one of its
5 primary purposes is “to achieve and maintain the maximum degree of correctness,
6 impartiality, **uniformity** and efficiency on the procedures.” A.R.S. § 16-452(A) (emphasis
7 added). Next, the 2023 EPM “implements, interprets or prescribes law.” The statute in fact
8 uses that precise language in its delegation: “the secretary of state **shall prescribe** rules.”
9 *Id.* And these “**rules** shall be prescribed in an official instructions and procedures manual.”
10 *Id.* § 16-452(B) (emphasis added). Further, the 2023 EPM is replete with instances in which
11 the Secretary purports to gap fill through his delegated power under no less than 15 state
12 statutes. *See* §§ 16-138(I), 16-246(G), 16-315(D), 16-341(H), 16-411(B)(1)(b), 16-449(A),
13 16-513.01, 16-453(A), 16-544(B), 16-579(A)(2), 16-602(B), 16-926(A), and 16-926(A).
14 Finally, dispelling all doubt that the 2023 EPM is a rule with the full force of law, the
15 statute makes a “violat[ion] any rule adopted pursuant to [section 16-452] ... guilty of a
16 class 2 misdemeanor.” § 16-452(C).

17 Nor is the Secretary exempt from the APA’s notice-and-comment procedures in
18 promulgating EPMs. “The rulemaking procedure of the APA ‘appl[ies] to all agencies and
19 all proceedings not **expressly** exempted.” *Arizona State Univ. ex rel. Arizona Bd. of*
20 *Regents*, 237 Ariz. At 250, ¶ 16 (emphasis added) (quoting A.R.S. § 41-1002(A)). And
21 “[n]either [A.R.S. § 16-452] nor the APA, *see* A.R.S. § 41-1005 ([2023]), exempt the
22 [Secretary] from rulemaking; therefore, rulemaking is required before [the 2023 EPM] can
23 be given effect.” *See id.* (citing A.R.S. § 41-1030(A)).

24 The inescapable conclusion is the Secretary, because of the nature of the 2023
25 EPM, was required to comply with the APA’s procedures for notice-and-comment
26 rulemaking.¹ It is equally clear he did not do so. On July 31, 2023, the Secretary released

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28 ¹ These procedures include includes preparing and making available to the public a

1 the 259-page draft EPM. (Verified Complaint ¶ 23) Throughout the July 31 draft EPM,
2 the Secretary purported to exercise delegated authority under various state statutes, most
3 prominently, the specific delegation in A.R.S. § 16-452(A). (*See generally*, Verified
4 Complaint Ex. 1) Despite the breadth of this rulemaking, the Secretary allowed for only
5 15 days—that is, 15 days short of the minimum under the APA—for the public to review
6 the July 31 draft EPM and provide comments. (Verified Complaint ¶ 24) Multiple
7 interested individuals and stakeholders, including Plaintiffs RNC and RPAZ, raised with
8 the Secretary the brevity of time allowed to review the 259-page EPM and provide
9 meaningful comment. (Verified Complaint ¶ 32) The Secretary turned away calls for
10 extending the comment period for the July 31 draft EPM and maintained any public
11 engagement was gratuitous and “[i]n keeping with the good practice of the prior
12 Administration.” (Verified Complaint ¶ 33) Three months later, on December 30, 2023,
13 without any additional public participation, the Secretary announced the final 2023 EPM,
14 which includes new rules and content that the Secretary added in consultation with the
15 governor and attorney general that the public never reviewed and never had the
16 opportunity to comment on. (Verified Complaint ¶ 35) *See* A.R.S. § 41-1025 (requiring
17 rules submitted for final promulgation not be substantially different from the rule
18 contained in the initial notice of rulemaking).

19 At bottom, the Secretary violated the APA, and Plaintiffs are likely to succeed in
20 establishing this violation. The remedy: declare that the 2023 EPM is invalid for failure to
21 substantially comply with the procedures outlined in A.R.S. §§ 41-1021 to -1029, and enjoin
22 enforcement of the 2023 EPM (including by criminal prosecution) until and unless the
23 Secretary complies with the APA’s rulemaking procedures.

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25 regulatory agenda, § 41-1021.02(A); providing notice of the proposed rulemaking,
26 following a statutorily prescribed format for consistency and clarity, and publishing the
27 notice in the register maintained by the Secretary, § 41-1022(A); providing at least 30
28 days after publication for the public to comment on the proposed rulemaking, § 41-
1023(B); holding an oral proceeding on the proposed rule if one is requested during the
comment period, § 41-1023(C); in most circumstances, submitting the proposed rule to
the governor’s regulatory review council or the attorney general for review, § 41-
1024(B)(1); and maintaining an official rulemaking record, § 41-1029(A).

1 **B. Alternatively, Plaintiffs Are Likely to Succeed in Establishing That**
2 **Each of the Challenged Provisions in the 2023 EPM Is Contrary to**
3 **Statute.**

4 By now, it is established that any EPM provision that exceeds a legislative grant of
5 authority or is contrary to statute is invalid. On four recent occasions, courts have
6 invalidated provisions in prior EPMs on these same grounds. *See McKenna v. Soto*, 250
7 Ariz. 469, 473, ¶ 19 (2021) (in excess of authority); *Leach v. Hobbs*, 250 Ariz. 572, 576, ¶
8 20 (2021) (contrary to statute); *Leibsohn v. Hobbs*, 254 Ariz. 1, 7, ¶ 122 (2022) (contrary
9 to statute); *Ariz. All. for Retired Ams. v. Crosby*, 537 P.3d 818, 823, ¶ 18 (Ariz. App. 2023)
10 (contrary to statute). In addition to Plaintiffs’ primary claim under the APA, this case
11 presents challenges to specific provisions in the 2023 EPM that exceed the Secretary’s
12 statutory authority or are expressly contrary to that authority. If the Court does not grant
13 immediate declaratory and injunctive relief under the APA (it should), then like prior courts,
14 this Court must determine the validity of these specific provisions, affording no deference
15 to the Secretary’s preferred interpretation of the governing statutes. *See Leibsohn v. Hobbs*,
16 254 Ariz. at 7, ¶ 122.²

17 1. *(Count II) The 2023 EPM rule that permits the use of previously*
18 *submitted DPOC to avoid application of juror non-residency law*
19 *conflicts with A.R.S. § 16-165(A)(10).*

20 The EPM directs county recorders to ignore the statutory process for cancelling a
21 person’s registration when the recorder receives information that a registered person stated
22 he or she is not a U.S. citizen on a juror questionnaire. Subsection 16-165(A)(10) of A.R.S.
23 provides “[t]he county recorder **shall cancel** a registration ... [w]hen the county recorder
24 obtains information ... and confirms that the person registered is not a United States
25 citizen.” This includes “when the county recorder receives a summary report from the jury
26 commissioner or jury manager . . . indicating that a person who is registered to vote has
27 stated that the person is not a United States citizen.” *Id.* Before the county recorder cancels

28 ² Plaintiffs seek preliminary injunctive relief on seven of their eight individual
challenges to the 2023 EPM. One of these challenges is, for the moment, foreclosed by the
federal district court’s decision in *Mi Familia Vota v. Fontes*, --- F. Supp. 3d ---, 2023 WL
8181307 (D. Ariz. Sept. 14, 2023).

1 the person’s registration, the recorder must send the person “by forwardable mail” notice
2 that his or her “registration will be canceled in thirty-five days unless the person provides
3 satisfactory evidence of United States citizenship.” *Id.* “If the person registered does not
4 provide satisfactory evidence within thirty-five days” of citizenship, “the county recorder
5 **shall cancel** the registration.” *Id.* (emphasis added).

6 Yet, Chapter 1, Section 9, Subsection C(2)(b) of the 2023 EPM states that upon
7 reviewing the summary report of juror questionnaires and identifying a true match between
8 a juror who declared themselves a noncitizen and a registered voter, “the County Recorder
9 shall determine whether the voter has previously provided DPOC³ or was registered to
10 vote before the DPOC requirement was adopted in 2004. If the person has previously
11 provided DPOC [or was registered to vote at the time the DPOC requirement went into
12 effect in 2004], the County Recorder **shall not cancel the registration.**” (Verified
13 Complaint Ex. 1 at 43 (56 of the pdf)) (emphasis added).

14 The 2023 EPM departs from subsection 16-165(A)(10) in three material ways:

15 *First*, the 2023 EPM departs from the statute’s process for confirming a person’s
16 voter registration after receiving information the person denied U.S. citizenship on a juror
17 questionnaire. Per the 2023 EPM, after a county recorder receives information that a
18 person indicated he or she is **not** a U.S. citizen on a juror questionnaire, the recorder must
19 determine whether the voter previously provided DPOC or was registered to vote before
20 the time the DPOC requirement went into effect in 2004. If the answer is yes, “the County
21 Recorder **shall not** cancel the registration”—despite the person affirmatively denying
22 citizenship on a juror questionnaire. (*See* Ex. 1 at 43 (56 of the pdf)) (emphasis added).⁴
23 The statute, on the other hand, expressly requires that the county recorder first notify the
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25 ³ “DPOC” is an acronym used throughout the 2023 EPM to indicate documentary
26 proof of citizenship in one of the forms required by A.R.S. § 16-166.

27 ⁴ If the answer is no, the 2023 EPM vaguely states “confirmation also includes reviewing
28 relevant government databases to which the County Recorder has access,” and, “[i]n some
situations, confirmation **may require** direct communication with the registrant.” *Id.*
(emphasis added). The EPM does not say how the county recorder should engage in such
direct communication with the registrant.

1 person of the citizenship inquiry. § 16-165(A)(10). Further, it requires the person in
2 question to affirmatively “provide[] satisfactory evidence” to the county recorder of his or
3 her citizenship. *Id.* The evidence must come from the person, not merely from the County
4 Recorder’s independent review of “relevant government databases.” If the person fails to
5 provide satisfactory evidence of citizenship within 35 days, “the county recorder shall
6 cancel the registration.” *Id.*

7 *Second*, the 2023 EPM shifts the statutory burden for proving citizenship after a
8 person denies U.S. citizenship on a juror questionnaire. Whereas the 2023 EPM requires
9 *the recorder* to confirm whether the voter previously provided DPOC or was registered at
10 vote at the time the DPOC requirement went into effect in 2004, the statute requires *the*
11 *person* who has denied citizenship on a juror questionnaire “provide[] satisfactory
12 evidence” to the county recorder of the contrary. *Id.*

13 *Third*, the 2023 EPM effectively changes what qualifies as permissible DPOC for
14 purposes of confirming citizenship after a person denies citizenship on a juror
15 questionnaire. The statute is clear: the person must “provide[] satisfactory evidence of
16 United States citizenship pursuant to § 16-166.” *Id.* The 2023 EPM, however, permits
17 county recorders to disregard section 16-166 and rely on “previously provided DPOC” or
18 a voter registration that predated when the DPOC requirement went into effect in 2004.
19 (*See* Ex. 1 at 43, n.29 (56 of the pdf).)

20 The 2023 EPM’s citizenship confirmation process for voters who denied U.S.
21 citizenship on a juror questionnaire conflicts with the statutory process outline in A.R.S.
22 § 16-165(A)(10) and therefore is invalid.

23 2. *(Count III) The 2023 rule permitting federal-only voters without*
24 *DPOC to vote in the PPE conflicts with A.R.S. § 16-127.*

25 The 2023 EPM expressly contradicts Arizona law by purporting to permit “federal-
26 only” voters—these are registered voters who have not submitted DPOC in accordance
27 with A.R.S. § 16-166—to vote in the PPE, Arizona’s presidential primary. Arizona’s
28 statute is clear: “A person who has registered to vote and who has not provided satisfactory

1 evidence of citizenship as prescribed by § 16-166 is not eligible to vote in presidential
2 elections.” A.R.S. § 16-127; *see also* A.R.S. § 16-401(A) (“All provisions of other laws
3 governing elections not in conflict and including registrations and qualifications of voters
4 are made applicable to and shall govern primary elections.”). Nevertheless, the EPM
5 purports to permit precisely what the statute forbids. Chapter 1, Section 2, Subsection A
6 states “a federal-only voter is eligible to vote solely in races for federal office in Arizona
7 (including the Presidential Preference Election (PPE)).” (Ex. 1 to Verified Complaint at 3
8 (16 of the pdf).) Accordingly, the Court must enjoin this provision of the EPM.

9 The PPE is a presidential election under Arizona law. First, the PPE is an election.
10 The PPE is conducted and canvassed in the same manner as primary elections. A.R.S. §
11 16-241(C). All laws governing the conduct of Arizona elections apply to it. *Id.* The
12 powers and duties of boards of supervisors and elections officials are the same for a PPE
13 as a primary election, and all laws defining election offenses also apply to a PPE. A.R.S. §
14 16-241(D), (E). Second, it is an election in which only presidential candidates appear on
15 the ballot. A.R.S. § 16-245. Hence, the prohibition against voters without DPOC voting in
16 presidential elections necessarily applies to the PPE. *See State v. Reynolds*, 823 P.2d 681,
17 682 (Ariz. 1992) (“We look primarily to the language of the statute itself and give effect
18 to the statutory terms in accordance with their commonly accepted meanings. . .”)

19 Because the PPE is plainly a presidential election and because A.R.S. § 16- 127
20 expressly forbids a voter who has not provided proof of citizenship to vote in a
21 presidential election, the 2023 EPM’s rule permitting “federal-only” voters to participate
22 in the PPE is contrary to law and must be set aside.

23 3. *(County VI) The 2023 EPM rule limiting public access to registrant*
24 *signatures conflicts with A.R.S. § 16-168(F).*

25 The 2023 EPM also wrongly restricts the ability of the public to view voter
26 signatures that may be used to verify signatures on mail-ballot affidavits, petitions and
27 candidate filings, contrary to statute. Chapter 1, Section 11, Subsection (C)(1) of the 2023
28 EPM states:

1 *A registrant's signature* may be viewed or accessed by a member of the
2 public only for purposes of verifying signatures on a candidate, initiative,
3 referendum, recall, new party, or other petition or for purposes of verifying
4 candidate filings. A.R.S. § 16-168(F). A County Recorder may establish the
5 conditions under which the signature may be viewed or accessed, including
6 prohibition of photography.

7 (Ex. 1 to Verified Complaint at 43 (56 of the pdf) (emphasis added).) The 2023 EPM thus
8 limits the public to viewing “a registrant’s signature” in the singular, even if there is more
9 than one on file. It also limits public access to signatures by narrowing purposes for which
10 these signatures may be accessed to the verification of petitions and candidate filings.

11 The relevant statute does not limit the public to a single instance of a voter’s
12 signature, and allows access to signatures for all “election purposes”:

13 Nothing in this section shall preclude public inspection of voter registration
14 records at the office of the county recorder for the purposes prescribed by
15 this section, except ... *the records containing a voter's signature* and a
16 voter’s e-mail address shall not be accessible or reproduced by any person
17 other than the voter, by an authorized government official in the scope of the
18 official's duties, for any purpose by an entity designated by the secretary of
19 state as a voter registration agency pursuant to the national voter registration
20 act of 1993 (P.L. 103-31; 107 Stat. 77), *for signature verification on
21 petitions and candidate filings, for election purposes and for news
22 gathering purposes by a person engaged in newspaper, radio, television or
23 reportorial work, or connected with or employed by a newspaper, radio or
24 television station or pursuant to a court order.*

25 A.R.S. § 16-168(F) (emphasis added.) Hence, the 2023 EPM conflicts with A.R.S. § 16-
26 168(F) in at least two ways. *First*, it limits public access to a “registrant’s signature” for
27 only the purposes of “verifying signatures on a candidate, initiative, referendum, recall, new
28 party, or other petition or for purposes of verifying candidate filings.” But the statute
expressly provides that the public shall have access to all “records containing a voter’s
signature” for these purposes and for “election purposes” which necessarily includes
signature verification on mail ballots.

Second, the 2023 EPM provision is phrased in the singular: “the registrant’s
signature” when multiple signatures are currently being consulted for the purpose of ballot

1 and petition verification by the Secretary. Indeed, litigation is currently pending challenging
2 the Secretary’s practice of consulting signatures outside the voter registration record. *See*
3 *Arizona Free Enterprise Club v. Fontes*, (Yavapai County Super. Ct. docket no.
4 S1300CV2023-00202). Until and unless a singular signature is to be referenced by elections
5 officials for petition and ballot verification, access to all signatures which may be used by
6 the County Recorder to verify a registrant’s vote (or petition signature) is critical.

7
8 4. *(Count VII) The 2023 EPM rule permitting active early voting list
ballot mailing out of state conflicts with A.R.S. § 16-544(B).*

9 The 2023 EPM flagrantly contradicts statute by authorizing ballots to be mailed to
10 addresses outside of Arizona to non-military/overseas voters. For many years, Arizona
11 voters have had the option of enrolling in the Active Early Voting List (AEVL). Once
12 enrolled on this list, a voter will—provided he or she maintains an active voting record and
13 keeps their address updated—be automatically mailed a ballot to his or her registered
14 address each election. The AEVL program is governed by A.R.S. § 16-544. This statute
15 specifically prohibits the use of an address outside Arizona, except for military
16 servicemembers and other expatriates protected by the federal Uniformed and Overseas
17 Citizens Absentee Voting Act (UOCAVA):

18 ***The voter shall not list a mailing address that is outside of this state for the***
19 ***purpose of the active early voting list*** unless the voter is an absent uniformed
20 services voter or overseas voter as defined in the uniformed and overseas
citizens absentee voting act [UOCAVA] (P.L. 99-410; 52 United States Code
section 20310).

21 A.R.S. § 16-544(B) (Emphasis added.)

22 Chapter 2, Section 1, Subsection B(1) of the 2023 EPM, however, disregards this
23 statutory command and blithely purports to allow “one-time requests” to have AEVL ballots
24 mailed outside of Arizona:

25 A voter enrolled in the AEVL may not request that ballots be automatically
26 sent to an out-of-state address for each election unless the voter is also a
27 UOCAVA voter. ***However, an AEVL voter may make one-time requests to***
28 ***have their ballot mailed to an address outside of Arizona for specific***
elections. A.R.S. § 16-544(B).

1 (Ex. 1 at 59 (72 of the pdf) (emphasis added)). This provision of the 2023 EPM facially
2 conflicts with A.R.S. § 16-544(B) because it permits the use of an out-of-state mailing
3 address for AEVL ballots for persons other than UOCAVA voters. There is no statutory
4 language that even conceivably authorizes any “one-time” exception for any election, let
5 alone elections, plural.

6 5. (Count VIII) *The 2023 EPM rule barring early-ballot challenges*
7 *received before the early ballot is returned and after the affidavit*
8 *envelope is opened conflicts with A.R.S. § 16-552(D).*

9 The 2023 EPM rule narrowly defining when an early ballot may be challenged
10 impermissibly narrows the period defined in A.R.S. § 16-552(D). That statute says, “All
11 challenges” to early ballots “shall be made in writing ... ***before the early ballot is placed***
12 ***in the ballot box.***” § 16-552(D) (emphasis added). For context, a ballot box is a secure
13 (historically, metal) box where separated (that is ballots that are no longer in their affidavit
14 envelope), voted ballots are placed before processing and tabulation. *See* § 608(A). So, per
15 statute, as long as the written challenge is received before the ballot is “placed” in the ballot
16 box, a challenge is timely.

17 Compare the period spelled out in subsection 16-552(D) to the 2023 EPM. Chapter
18 2, Section 5, Subsection A of the 2023 EPM states: “Challenges to early ballots must be
19 submitted in writing after an early ballot is returned to the County Recorder and prior to the
20 opening of the early ballot affidavit envelope.” (Ex. 1 to Verified Complaint at 79 (92 of
21 the pdf).) The 2023 EPM then bars challenges outside this narrower window: “[c]hallenges
22 received ***before the early ballot is returned*** or ***after the affidavit envelope containing the***
23 ***ballot has been opened***” are deemed “summarily denied as untimely.” *Id.* (emphasis added).

24 The 2023 EPM does not even try to comply with period defined in the statute: any
25 time “before the early ballot is placed in the ballot box.” A.R.S. § 16-552(D).

26 Once again, the Secretary has contravened a clear and express statutory directive.
27 Thus, the rule narrowly defining when a person may challenge early ballots is invalid.
28

1 16-125 (dealing with electors who move precincts during the twenty-nine day period
2 preceding an election), 16-135 (allowing a voter who moved inside a county to vote in the
3 correct precinct for his new address upon presentation of identification including the voter’s
4 residence address), or 16-584 (allowing a voter who moved to a new county to correct
5 voting records for purposed of voting in future elections at the appropriate polling place for
6 his new address) permits a voter in a precinct-based county to vote in a different precinct.⁵

7 Because these provisions of the 2023 EPM directly conflict with A.R.S. § 16-122 by
8 purporting to permit voting by out-of-precinct voters in direct contravention of the statute,
9 they must be set aside as contrary to law.

10 **II. The Secretary’s Failure to Adhere to the APA’s Notice-and-Comment**
11 **Rulemaking Process in Adopting the 2023 EPM, and His Violations of**
12 **Arizona’s Election Statutes, Irreparably Injures Plaintiffs.**

13 Because Plaintiffs’ claims center on the Secretary’s actions that are in clear
14 contravention of controlling statutes (the APA and Arizona election statutes), Plaintiffs’
15 entitlement to injunctive relief is not conditioned upon a separate showing of irreparable
16 injury. *See AZPIA*, 250 Ariz. at 64, ¶ 26 (“Because Plaintiffs have shown that the Recorder
17 has acted unlawfully and exceeded his constitutional and statutory authority, they need not
18 satisfy the standard for injunctive relief.”). This reflects the view that “irreparable harm to
19 the public is presumed” when a public officer abuses his position. *Id.*

20 Further, absent preliminary relief, the Secretary will move forward with
21 implementation and enforcement of an EPM that is directly contrary to Arizona law.
22 Plaintiffs have an acute interest in state election officials faithfully applying federal and
23 state law in the administration elections in this state—and avoiding criminal sanctions.
24 For example, Plaintiff RNC represents over 35 million registered Republicans in all 50
25 states, the District of Columbia, and the U.S. territories. (Verified Compl. ¶ 6.) Like

26 ⁵ While the federal Help America Vote Act, 52 U.S.C. § 20901-21145 (HAVA), requires that
27 voters presenting to vote at a precinct who cannot establish their entitlement to vote in the
28 precinct must be issued a provisional ballot, 52 U.S.C. 21082(a), such provisional ballots are only
required to be counted if the county recorder (or other responsible elections official) later
determines the voter issued a provisional ballot was eligible to vote in the precinct, must the vote
be counted. *Id.*

1 Plaintiff RPAZ, Plaintiff RNC promotes the election of Republican candidates in Arizona,
2 and all Plaintiffs have an interest in the administration of elections and the competitive
3 environment affecting their candidates. (*Id.* ¶¶ 6, 7, 8.) The protection and promotion of
4 the procedural integrity of Arizona elections is central to Plaintiffs’ missions.

5 The risk of irreparable injury is heightened here given the Secretary’s decision to
6 significantly expand the EPM (contrary to statute and administrative process) to create
7 new rules that county elections officials must follow in the upcoming 2024 elections. If
8 the 2023 EPM stands, Plaintiffs will have to divert significant resources to prepare
9 volunteers and the larger party apparatus to comply with election rules that violate
10 Arizona law. For example, Plaintiff Yavapai County Republican Party is directly
11 responsible for appointing ballot challengers and those challengers will, absent an
12 injunction, be made to comply with the EPM’s restrictions on ballot challenges under
13 penalty of law. (*See id.* ¶¶ 6, 7, 8.) The kinds of injuries alleged cannot be adequately
14 remedied absent preliminary relief from this Court.

15 **III. Equitable and Public Policy Considerations Support Injunctive Relief.**

16 Because the Secretary’s enforcement or implementation of the challenged 2-23
17 EPM “does not comply with Arizona law, public policy and the public interest are served
18 by enjoining his unlawful action.” *AZPIA*, 250 Ariz. at 64 ¶ 27. Here, the result of an
19 injunction will simply be a reversion to the previous version of the EPM which has
20 governed Arizona’s last two general elections. An injunction now will prevent confusion
21 by halting implementation of the EPM well in advance of Arizona’s 2024 primary and
22 general elections.

23 **CONCLUSION**

24 For the foregoing reasons, the Court should preliminarily enjoin the Secretary from
25 implementing or enforcing the 2023 EPM. Alternatively, the Court should preliminarily
26 enjoin the Secretary from implementing or enforcing the six provisions of the 2023 EPM
27 outlined in the above argument.

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DATED this 14th day of February, 2024.

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